No. PD-1199-18

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

OBINNA EBIKAM, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Bexar County

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STATE'S BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The court of appeals affirmed appellant's conviction in a short, memorandum opinion because he was not entitled to an instruction on self-defense even under the most permissive standard that this Court has alluded to or could create.

STATEMENT REGARDING ORAL ARGUMENT

The Court granted oral argument when it granted appellant's petition for discretionary review. The State requests oral argument.

STATEMENT OF FACTS

Appellant was charged with assault. The information alleged he intentionally, knowingly, or recklessly caused bodily injury to the victim "by STRIKING THE

COMPLAINANT WITH THE HAND OF THE DEFENDANT."[1]

The victim, Joy Ebo, testified. She and appellant were involved.[2] Ebo went to appellant's apartment after she called him and a woman picked up.[3] Appellant dragged Ebo inside his apartment and then his room.[4] Ebo's testimony was clear: appellant hit her in the face with his hands.[5] She suffered visible injuries—a bruised and bleeding lip.[6]

Appellant testified. He repeatedly denied any intent to hurt Ebo, sometimes citing her pregnancy.[7] He repeatedly denied striking her with his hand.[8] He repeatedly denied any conflict took place inside his apartment other than Ebo breaking his cell phone and then hers.[9] He repeatedly denied observing any injury to

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[1] 1 CR 8 (caps in original).

[2] 3 RR 163-65.

[3] 3 RR 167.

[4] 3 RR 168.

[5] 3 RR 168, 169, 172.

[6] 3 RR 172-173. She also suffered injuries to her hands from defending herself and her unborn child, and mentioned appellant shoving her "again" after shutting the door, presumably to his apartment. 3 RR 168-69, 170, 173.

[7] 3 RR 229, 233, 259, 261.

[8] 3 RR 232, 259-60.

[9] 3 RR 229, 230, 231, 232, 257. Ebo said she broke his phone after he broke hers. 3 RR 197-98.

her face.[10] The only use of force he admitted to was an attempt to keep her out of his apartment:[11] "that was the only confrontation."[12] As to the cause of her claimed injury, he said:

> To answer the question, well, you know, someone is trying to struggle to get into someone's apartment, and in the process, the lips are so tender, I didn't hit her. If she sustained any injury, I did not see. I left my house just to let peace remain. I did not see any busted lips. I did not -- other than than (sic) what I'm seeing, you know, here, you know, presented to us, you know, and evidence which I did not hit her.[13]

He added, "Something will cause [the injury;] either someone will hit you or you sustain injury yourself."[14] Defense counsel summarized his testimony thus:

> He said he doesn't know how she got [the injury to her face]. He said she got it through the scuffle maybe, but he didn't know -- he doesn't have to admit that the injury was caused by that contact. He only has to admit that he used force against her.[15]

SUMMARY OF THE ARGUMENT

Appellant denied the assault the State alleged and proved. He also denied causing any injury to the victim or having any culpable mental state. The court of appeals would have overruled his point of error for his denial of these elements but

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[10] 3 RR 259.

[11] 3 RR 228, 229, 231, 233, 257, 260.

[12] 3 RR 257.

[13] 3 RR 259-60.

[14] 3 RR 260. English is not appellant's first language. 3 RR 269.

[15] 3 RR 277.

was forced to frame the issue differently because of *Gamino v. State*, 537 S.W.3d 507 (Tex. Crim. App. 2017). This Court should disavow the offending language in *Gamino* and reaffirm that justification defenses like self-defense require an admission to all the elements of the offense, including the culpable mental state.

Alternatively, there is no existing or potential theory of justification law that would entitle appellant to an instruction on self-defense.

ARGUMENT

I. What the Court of Appeals held (and why).

Appellant has framed the question presented thus: "Whether a defendant's failure to admit the exact manner and means of an assault as set forth in a charging instrument is a sufficient basis to deny a jury charge on self-defense." It is not clear that was the holding of the court of appeals. Considered as a whole, that court's analysis suggests the problem is not with a defendant who fails to admit to the charged manner and means as much as it is a defendant who fails to admit the charged offense happened—at all.

As shown above, appellant argued at trial that all he had to admit was *a* use of force and why he believed it necessary, not that he intended to or even recklessly caused any injury.[16] He did not argue any differently on appeal. As the court of appeals noted, appellant argued that he was not "required to admit to every statutory

[16] 3 RR 277.

element of the off[ense,]"[17] only that he had "some participation in the offense."[18] In response, the court of appeals noted its "strict adherence," recently reaffirmed, to its position that a defendant must admit to every element of the offense, including the requisite culpable mental state.[19] Plan A, then, would have been to overrule appellant's point of error based on his admitted lack of admission.

The court of appeals could not adhere to its policy, however, because this Court "ha[d] even more recently stated" in *Gamino* that, "'Admitting to the conduct does not necessarily mean admitting to every element of the offense.'"[20] So the court of appeals went with Plan B, which is the subject of appellant's petition:

> Regardless of whether a defendant generally has to admit to every element of an offense to be entitled to a self-defense instruction, we hold Ebikam had to admit to more than using force to push on the door to block Ebo's entry in order to be entitled to a self-defense charge in this case. In order to find Ebikam guilty, the jury was instructed in the jury charge that it had to find that Ebikam intentionally or knowingly or recklessly caused bodily injury to Ebo "by striking the complainant with the hand of the defendant." Therefore, in order to be entitled to a self-defense instruction, Ebikam was required to admit that he struck Ebo with his hand but did so because he reasonably believed striking Ebo with his hand was immediately necessary to protect himself against Ebo's use or attempted use of unlawful force.[21]

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17 Slip op. at 2 (alteration in opinion). *See* App. Br. to the 4th Court at 17.

18 Slip op. at 2-3; App. Br. to the 4th Court at 17.

19 Slip op. at 3 (citations and quotations omitted).

20 Slip op. at 4 (quoting *Gamino*, 537 S.W.3d at 512).

21 Slip op. at 4.

Appellant construes this as the pronouncement of a *de facto* rule that defendants must confess to the non-statutory manner and means alleged in the charging instrument. But it would make no sense to accept this Court's pronouncement that the admission to statutory elements is unnecessary but conclude the admission to factual averments is. In context, it appears the court is explaining why appellant failed even on his own terms.

If, as appellant asserted, all that is required to be entitled to a self-defense instruction is to admit "some participation in the offense," it follows that the defendant would have to at least admit that "the offense" happened. Appellant did not even do that. "The offense" is a confrontation appellant denies happening. His "admission" to pushing on a door (but not causing injury) is nothing like the allegation (matched by Ebo's testimony) that appellant caused her injury by striking her in the face with his hand. That is why appellant "had to admit to more than using force to push on the door to block Ebo's entry in order to be entitled to a self-defense charge *in this case*."[22]

In other words, his version of events so differed from the allegations (and Ebo's testimony) that it amounted to a denial of it and, at best, some other "justified" activity. The court of appeals was thus correct for two reasons. First, the court of appeals's pre-*Gamino* position is correct; this Court should re-affirm it. Second,

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[22] *Id*. (emphasis added).

under any standard, the chasm between appellant's blanket denials/irrelevant "admission" and the contested issue at trial would disqualify anyone from a justification defense. These will be addressed in turn.

II. This Court should clarify its justification jurisprudence.

Over the last two decades, this Court has built a body of justification law that accords with the relevant statutes and is, for the most part, internally consistent. But there is a threat to that stability and *Gamino* is its face. This case presents an opportunity to remove any doubts and give the bench and bar the guidance it needs to make sure only the defendants who deserve self-defense instructions get them.

The statutes require an admission to *all* the elements.

The court of appeals's position that a defendant must admit all the elements of the charged offense—including the culpable mental state—follows the applicable statutes. It is true that Sections 9.31 and 9.32 literally require only that a defendant's use of force be reasonable; neither explicitly requires one of the culpable mental states listed in Section 6.03.[23] But why would they? Culpable mental states are a requirement for offenses[24]—self-defense is a defense. Moreover, it is a special kind of defense. Section 9.02, "Justification as a Defense," says, "It is a defense to

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[23] TEX. PENAL CODE § 6.03. All references to "sections" refer to the Penal Code.

[24] TEX. PENAL CODE § 6.02(a).

prosecution that the conduct in question is justified under this chapter."[25] Sections 9.31 and 9.32 are "in this chapter." And whatever lay definition the word "conduct" may have, it is defined by and for the Penal Code: "'Conduct' means an act or omission and its accompanying mental state."[26] That means an offense.[27] The plain language of the statutory scheme thus requires that both the act and the requisite culpable mental state be justified by, in this case, self-defense. If, as this Court repeatedly says, the best evidence of the Legislature's intent is the plain language of the law it passed,[28] this Court cannot ignore the requirement that a defendant justify the culpable mental state without also ignoring the Legislature's prerogative to define offenses and defenses.[29]

This Court's cases have said the same.

The court of appeals's default position also follows the bulk of this Court's case law. Even before the Court routinely referred to justification and "confession and avoidance" interchangeably, it made clear that a confession to the commission

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[25] TEX. PENAL CODE § 9.02.

[26] TEX. PENAL CODE § 1.07(10).

[27] TEX. PENAL CODE §§ 6.01(a) (requirement of conduct including act or omission), 6.02(a) (requirement of engaging in conduct with mental state).

[28] *Chambless v. State*, 411 S.W.3d 498, 503 (Tex. Crim. App. 2013); *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

[29] *Willis v. State*, 790 S.W.2d 307, 314 (Tex. Crim. App. 1990) ("the power to create and define offenses rests within the sound discretion of the legislative branch of government . . . necessarily includes the power to establish and define the defenses to criminal offenses.").

of the offense—including the requisite mental state—was required. This line of cases is consistent and builds upon itself.

In 1999, in *Young v. State*, the Court framed entitlement to a necessity instruction thus:

- "When the necessity defense applies, it justifies the defendant's conduct in violating the literal language of the criminal law and so the defendant is not guilty of the crime in question."[30]

- "In order to raise necessity, a defendant admits violating the statute under which he is charged and then offers necessity as a justification which weighs against imposing a criminal punishment for the act or acts which violated the statute."[31]

- "To raise necessity, Appellant must admit he committed the offense and then offer necessity as a justification."[32]

In 2004, in *Ex parte Nailor*, a unanimous Court considered whether defense counsel was ineffective for failing to pursue an instruction on self-defense.[33] Nailor would not have been entitled to a self-defense instruction because "[his] defense was more in the nature of a denial of two of the State's alleged elements, [intent and the alleged act,] rather than an admission of those elements with a legal justification for

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[30] *Young v. State*, 991 S.W.2d 835, 838 (Tex. Crim. App. 1999) (quoting Wayne R. LaFave and Austin W. Scott, Jr., Criminal Law § 5.4(a) (2d ed.1986, supp.1993)) (internal quotations omitted, alteration in *Young*).

[31] *Id*.

[32] *Id*. at 839.

[33] *Ex parte Nailor*, 149 S.W.3d 125 (Tex. Crim. App. 2004).

them."[34] The Court relied heavily on *Young*.[35]

In 2007, *Shaw v. State* considered the "Good Samaritan" defense now found in TEX. PENAL CODE § 22.04(k)(2) and said of confession-and-avoidance defenses:[36]

- A defendant must present some evidence "not that she lacked the requisite mental state necessary to commit the offense, but that she in fact harbored the requisite mental state, but nevertheless engaged in the conduct under emergency circumstances, in good faith, and with reasonable care."[37]

- A "confession and avoidance" or justification defense "by definition, does not negate any element of the offense, including culpable intent; it only excuses what would otherwise constitute criminal conduct."[38]

- "[A] defensive instruction is only appropriate when the defendant's defensive evidence essentially admits to every element of the offense *including* the culpable mental state, but interposes the justification to excuse the otherwise criminal conduct."[39]

The Court cited *Young* and *Nailor* with approval.[40]

In 2010, in *Juarez v. State*, a unanimous Court recognized some inconsistency in its application of the confession and avoidance doctrine over the preceding sixty

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[34] *Id*. at 133.

[35] *Id*. at 134.

[36] *Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007).

[37] *Id*. at 649.

[38] *Id*. at 659.

[39] *Id*. (emphasis in original).

[40] *Id*.

years[41] so it clarified the law:

- "[A] defendant must admit to the conduct—the act and the culpable mental state—of the charged offense to be entitled to a necessity instruction."[42]

- "[T]he doctrine [of confession and avoidance] requires an admission to the conduct, which includes both the act or omission and the requisite mental state."[43]

- "The doctrine of confession and avoidance applies to the Penal Code's necessity defense. As a result, a defendant cannot flatly deny the charged conduct—the act or omission and the applicable culpable mental state."[44]

Young, *Nailor*, and *Shaw* were cited extensively.[45]

In 2013, in *Villa v. State*, this Court confirmed that the medical care defense found in TEX. PENAL CODE § 22.011(d) is one of confession and avoidance:[46]

- "As such, a defendant claiming entitlement to an instruction on the medical-care defense must admit to each element of the offense, including both the act and the requisite mental state."[47]

- "An instruction on a confession and avoidance is appropriate only 'when the defendant's defensive evidence essentially admits to

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[41] *Juarez v. State*, 308 S.W.3d 398, 403 (Tex. Crim. App. 2010). All eight other judges joined Judge Keasler's opinion and three also joined Judge Holcomb's concurrence.

[42] *Id*. at 399 (citation omitted).

[43] *Id*. at 404.

[44] *Id*. at 406.

[45] *Id*. at 401-06, 408.

[46] *Villa v. State*, 417 S.W.3d 455, 462 (Tex. Crim. App. 2013).

[47] *Id*.

> every element of the offense including the culpable mental state, but interposes the justification to excuse the otherwise criminal conduct.'"[48]

The Court relied primarily on *Juarez* but also on *Shaw*.[49]

As recently as 2018, the Court reaffirmed in *Rogers v. State* that "[s]elf-defense and necessity are confession-and-avoidance defenses" embracing the accompanying mental state of the offense.[50]

These cases could not be more clear that justification defenses like self-defense require a confession to all the elements of the offense, including the culpable mental state. The application of law to fact in these cases also show that a defendant who denies any or all of the elements of the charged offense is not entitled to a justification defense whereas a defendant who fairly offers a confession to all the elements is.[51] This is as the Legislature intended.

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[48] *Id*. (quoting *Shaw*, 243 S.W.3d at 659).

[49] *Id*. at 460-62.

[50] *Rogers v. State*, 550 S.W.3d 190, 192, 193 n.1 (Tex. Crim. App. 2018).

[51] *Young*, 991 S.W.2d at 836-37, 839 (Young was not entitled to necessity instruction because he denied both the intent to harm his civilian captors and stabbing the gas pedal or grabbing the vehicle's steering wheel thereby forcing the vehicle to hit gas pumps at a convenience store; he said the driver did that accidentally while trying to stop Young from escaping the vehicle); *Ex parte Nailor*, 149 S.W.3d 132-34 (Nailor was not entitled to self-defense instruction because he denied striking his wife and claimed she was accidentally hit in the face with the brass eagle with which she was trying to hit him); *Shaw*, 243 S.W.3d at 660 (Shaw was not entitled to the Good Samaritan instruction because she offered no evidence she harbored the requisite reckless mental state); *Juarez*, 308 S.W.3d at 405 (Juarez was entitled to a necessity instruction because his testimony embraced, in plain language, a confession to both the act and the culpable mental state); *Villa*, 417 S.W.3d at 462 (Villa was entitled to a medical-care instruction because his testimony could have been (continued...)

But there are blemishes on this Court's otherwise-consistent record.

Despite this consistency and clarity, this Court recently created uncertainty by making multiple statements in *Gamino* that run contrary to and ignore all of the cases cited above. This language not only prevented a cleaner resolution of this case below and forms a substantial part of appellant's argument in this Court,[52] it served as the basis for the court of appeals's reversal of another self-defense case currently pending in this Court.[53] Upon review, *Gamino* and the cases upon which it is built are not only inconsistent with the bulk of this Court's jurisprudence but illustrate the dangers of *dicta*.

Gamino's holding was correct, but not its legal analysis.

Gamino was charged with aggravated assault by intentionally or knowingly threatening the victim with imminent bodily injury while using or exhibiting a deadly weapon (firearm).[54] The State claimed Gamino failed to admit to threatening the victim with imminent bodily injury because he did not admit to the threats or act

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[51](...continued)
construed to technically include the forbidden act).

[52] App. Br. at 11 ("A defendant is not required to concede the State's version of the events in order to be entitled to a self-defense instruction. *Gamino*, 537 S.W.3d at 512. Admitting to the conduct does not necessarily mean admitting to every element of the offense. *Gamino*, 537 S.W.3d at 511-512[.]").

[53] *John Christopher Foster v. State*, PD-0039-19; *see Foster v. State*, No. 03-17-00669-CR, 2018 WL 3543482, at *5-6 (Tex. App.–Austin July 24, 2018, pet. granted) (not designated for publication).

[54] *Gamino*, 537 S.W.3d at 509 n.3, 512-13.

described by the victim, *i.e.*, pointing his gun at him.[55] The Court rightly rejected that argument, reasoning that Gamino's admitted display of his gun and warning to the victim to stay back could reasonably be construed as a threat.[56] It was a factual, rather than legal, holding. The Court could have ended the analysis with its statement that "'[Gamino] was not required to concede the State's version of the events'" to be entitled to self-defense.[57]

But it did not. The Court added, "Admitting to the conduct does not necessarily mean admitting to every element of the offense. For example, a defendant can '*sufficiently* admit to the commission of the offense' of murder even when denying an intent to kill."[58] The Court quoted *Martinez v. State*[59] and also cited *Alonzo v. State* [60] for this proposition,[61] and both will be discussed below. What is important at this point is that the issue in *Gamino* was one of the insufficient admission of the act,[62] not whether an admission was required or whether all elements

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55 *Id*. at 511-12.

56 *Id*.

57 *Id*. at 512 (quoting *Gamino v. State*, 480 S.W.3d 80, 88 (Tex. App.–Fort Worth 2015)).

58 *Id*. (citation omitted, emphasis in *Gamino*).

59 *Martinez v. State*, 775 S.W.2d 645 (Tex. Crim. App. 1989).

60 *Alonzo v. State*, 353 S.W.3d 778 (Tex. Crim. App. 2011).

61 *Gamino*, 537 S.W.3d at 512 n.20.

62 *Id*. at 511.

must be admitted to. This might explain why none of the style cases in this body of law were discussed or even mentioned; there was simply no occasion to comment on whether confession and avoidance can be satisfied without admitting to every element of the offense (including the requisite culpable mental state).[63] These two sentences were unnecessary to the holding. They were *dicta*.

Martinez is an awful case.

Gamino relied primarily on *Martinez* for the notion that a confession to the commission of an offense is sufficient even when a defendant denies some of its elements. It should not have, for multiple reasons.

Martinez was convicted of murder.[64] He claimed that, although he drew his gun out of fear, he did not intend to shoot or kill the victim; Martinez said his mother-in-law grabbed his arm after he fired a warning shot into the air and "the gun went off several times," killing the victim.[65] Martinez sought and received an instruction on accident but was denied an instruction on self-defense.[66] Notwithstanding his testimony and defensive posture at trial, this Court held that Martinez "did sufficiently admit to the commission of the offense" because he "admitted to pulling

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[63] *Shaw* was cited for the "light most favorable" standard. *Gamino*, 537 S.W.3d at 510, 512-13.

[64] 775 S.W.2d at 645.

[65] *Id*. at 646.

[66] *Id*. at 645 n.1.

out the gun, firing it into the air, and having his finger on the trigger when the fatal shot was fired."[67] It added that the specific denial of any intent to kill the victim "alone does not preclude an instruction on self-defense."[68] The Court concluded, however, that "[t]he evidence fail[ed] to raise the issue of self-defense by deadly force" because Martinez should have retreated.[69]

The problems with *Gamino*'s reliance *Martinez* are obvious. First, working backwards, the portions cited by *Gamino* were *dicta* because the Court denied Martinez the instruction anyway. Second, a strategy that denies any guilt by negating the requisite culpable mental state is at odds with the two decades of this Court's subsequent precedent summarized above. Third, and finally, the claim of "justified accident" was specifically rejected in *Ex parte Nailor*, and on better facts.[70]

Martinez has no place in modern self-defense law. Perhaps that is why *Martinez* has been cited by this Court in only four cases other than *Gamino*: once for

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[67] *Id*. at 647.

[68] *Id*.

[69] *Id*. at 647-48.

[70] *Ex parte Nailor*, 149 S.W.3d at 134 ("Both trial counsel's argument and appellant's testimony centered on a lack of intent, *i.e.*, it was an accident. As in *Young*, appellant argued that 'he did not have the requisite intent and he did not perform the actions the State alleged.' Accordingly, appellant was not entitled to an instruction on self-defense.") (citation omitted).

the duty to retreat,[71] twice to make a point of how anomalous it is,[72] and in *Alonzo*—the other case cited by *Gamino*.

Alonzo should not have invoked Martinez.

In *Alonzo*, this Court determined that self-defense could be invoked by a defendant accused of a "reckless" offense.[73] The Court correctly noted that "[t]he Penal Code does not require that a defendant intend the death of an attacker in order to be justified in using deadly force in self-defense."[74] In context, this was presumably intended as a statement that neither Section 9.32, by its plain terms, nor Section 9.01(3), which defines "deadly force," requires the intent to cause death.[75] But the Court cited *Martinez* for the proposition that a "defendant in [a] murder trial

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[71] *Riddle v. State*, 888 S.W.2d 1, 7 (Tex. Crim. App. 1994).

[72] *Juarez* recognized *Martinez* as one of "a handful of cases" in the preceding sixty years that "ignored the confession and avoidance doctrine altogether." 308 S.W.3d at 403. A plurality in *Cornet v. State* noted that *Juarez* "treated *Martinez* as little more than a legal anomaly and pointed out that we have, since *Martinez*, re-emphasized the applicability of confession and avoidance to self-defense, at least as it relates to misdemeanor assault." 359 S.W.3d 217, 225 n.43 (Tex. Crim. App. 2012) (plurality) (citation omitted).

[73] *Alonzo*, 353 S.W.3d at 782 ("Moreover, it is not illogical to plead a justification defense to an accusation of a reckless offense.").

[74] *Id*. at 783.

[75] "'Deadly force' means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury." TEX. PENAL CODE § 9.01(3).

may receive [a] self-defense instruction [even] if he denies [the] intent to kill."[76] Again, that *dicta* from *Martinez* was about the applicability of self-defense to an "intentional" offense notwithstanding the claim of accident; it offered nothing to settle the question presented in *Alonzo*.

In fairness, *Alonzo* goes on to say that "[t]he self-defense provisions in the Penal Code focus on the actor's motives and on the level of force used, not on the outcome of that use of force[,]" and that Sections 9.31 and 9.32 apply "regardless of the actual result of the force used" so long as the defendant acted reasonably under the circumstances.[77] But it is unclear why *Alonzo* said this. Was it intended, in the spirit of *Martinez*, to divorce entitlement to self-defense from the elements of the charged offense? That would conveniently sidestep the paradox of "justified recklessness" *Alonzo* created. If that were the case, one would hope that the opinion would have mentioned the phrase "confession and avoidance" or distinguished (or mentioned) at least one of the cases detailed above. But it did not.

As it stands, *Alonzo*'s only value is as a policy statement that the considerations underlying self-defense can apply when juries pass on a defendant's recklessness *vel*

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[76] *Alonzo*, 353 S.W.3d at 783 n.20.

[77] *Id*. at 783.

non.[78] It should not be viewed as an endorsement of *Martinez*'s *dicta* on getting a self-defense instruction despite denying the requisite culpable mental state of the charged offense.

This Court should disavow these outliers and affirm based on established rules of justification law.

This Court has offered two lines of cases dealing with justification defenses including self-defense. The first is a coherent line that builds upon itself and comports with the plain language of the relevant statutes. This line of cases requires a defendant to admit, in plain language, both the act/omission and culpable mental state of the charged offense. The second line consists of one case that is a recognized anomaly and two cases that repeat its *dicta* for no reason. The second line is causing real confusion in the law. It should be disavowed. Under the bulk of this Court's self-defense law, appellant's admitted lack of admission should make resolution of this case simple.

III. This case does not present a "manner and means" issue.

If the court of appeals has created a rule that a defendant must admit to the manner and means alleged in the charging instrument, Appellant is correct to complain. But his reasoning is wrong and, regardless, he could not benefit from whatever rule this Court might craft because he admitted to no manner and means of

[78] *Id*. at 784 (Keller, P.J., concurring).

committing any offense.

Appellant's legal argument is generally correct but for the wrong reasons.

Appellant puts the contested language in *Gamino* at the core of his argument,[79] cites *Martinez* as an example of the defendant's ability to deny an element of the charged offense,[80] and cites six cases to suggest that a denial of the specific allegations of the charging instrument is not fatal to entitlement.[81] But *Gamino* did not present a case of variance between the pleadings and the "confession" because the indictment did not specify the words and acts alleged by the State's witnesses,[82] *Martinez* has no precedential value for the reasons detailed above, and the

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[79] App. Br. at 11 ("A defendant is not required to concede the State's version of the events in order to be entitled to a self-defense instruction. *Gamino*, 537 S.W.3d at 512. Admitting to the conduct does not necessarily mean admitting to every element of the offense. *Gamino*, 537 S.W.3d at 511-512[.]").

[80] *Id*. at 13.

[81] *Id*. at 13-14. *See Hubbard v. State*, 133 S.W.3d 797 (Tex. App.–Texarkana 2004, pet. ref'd); *Kemph v. State*, 12 S.W.3d 530 (Tex. App.–San Antonio 1999, pet. ref'd); *Torres v. State*, 7 S.W.3d 712 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd); *Withers v. State*, 994 S.W.2d 742 (Tex. App.–Corpus Christi 1999, pet. ref'd); *Holloman v. State*, 948 S.W.2d 349 (Tex. App.–Amarillo 1997, no pet.). In the sixth, *Jackson v. State*, 110 S.W.3d 626, 632, (Tex. App. – Houston [14th Dist.] 2003, pet. ref'd)—the only case relied upon by appellant in the court of appeals—the court held he was not entitled to self-defense because there was no evidence the victim used or attempted to use force against him.

[82] *Gamino*, 480 S.W.3d at 88 ("Nothing in the indictment required Appellant to point the gun at Khan. Nothing in the indictment required the threat to be communicated verbally or by a particular use of the gun.").

intermediate court cases predate all or nearly all of this Court's law discussed above.[83] Appellant should not have relied on any of these cases.

But appellant is not wrong on his ultimate legal point. To the extent the Fourth Court's opinion can be read to require a strict admission of the alleged factual averments in the charging instrument in all cases, that it is not (or at least should not be) the law. There are two reasons for this.

First, as a matter of law and basic fairness, a defendant should be no more bound by the alleged manner and means than is the State. This Court has built a comprehensive body of law that measures the sufficiency of the evidence against the hypothetically correct jury charge and forgives variances between the pleadings and proof that are immaterial.[84] It is a good body of law, as it prevents windfalls when the State's evidence is not what it anticipated.[85] It would be unfair to permit the State to obtain a conviction on a factual manner and means that differs from the alleged manner and means while denying a justification defense to a defendant on the same grounds.

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[83] Four predate *Young* and the other two predate all but *Young*.

[84] *See generally Johnson v. State*, 364 S.W.3d 292, 294-99 (Tex. Crim. App. 2012) (explaining this area of law).

[85] In *Johnson*, for example, this Court upheld a conviction in which the State alleged the defendant "cause[d] serious bodily injury to [the victim] by hitting her with his hand or by twisting her arm with his hand" but the victim testified that he caused her broken arm when he threw her against the wall and she fell to the floor. 364 S.W.3d at 293.

Second, as a factual matter, in most cases a defendant can adequately admit to all the elements (including the requisite culpable mental state) without reciting statutory language or agreeing with the State or its witnesses as to exactly how the charged offense was accomplished. *Gamino* illustrates this, as do all of the lower court cases cited by appellant in which the defendants were entitled to a justification defense:

- Holloman never expressly said he "hit" his wife as alleged, but he admitted he "tussled" with her, including landing on top of her when they fell to the kitchen floor, and that he "fought" her, albeit not "all out."[86]

- Withers (a school teacher) denied the acts alleged in the indictment (pulling a student's ears, grabbing him by the neck, and/or holding him to the floor by pushing against his shoulders) but admitted to the physical confrontation, that they fought on the floor, and that she applied force to his back while on the floor to keep him under control.[87]

- Torres denied intentionally or knowingly causing his wife bodily injury but "admitted to grabbing his wife by her hair, possibly hitting her in the face when he grabbed the hair at her forehead, struggling with her, and pushing her away."[88]

- Kemph denied the allegations that he kicked and bit the officers but admitted he used force by struggling against them as they

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[86] *Holloman*, 948 S.W.2d at 351-52.

[87] *Withers*, 994 S.W.2d at 744-46.

[88] *Torres*, 7 S.W.3d at 716. It is unclear if the information also alleged recklessness.

attempted to arrest him.[89]

- Hubbard did not admit intentionally or knowingly (as alleged) or recklessly (as required by the lesser-included offense) causing his cell mate's death, but he admitted to causing the injuries that led to the victim's death during a fight with the victim.[90]

In each case, the defendant acknowledged the existence of a physical altercation and having some role in it that satisfied the elements of the offense charged. For the purpose of confession and avoidance, there is little more one could ask of a defendant other than to recite the language of the charging instrument. Juries should be permitted to use common sense in such situations.

But appellant did not confess to a different manner and means.

Comparison of these cases with appellant's shows why he would not be entitled to a justification defense no matter how this Court eventually settles the "manner and means" issue. In each of those cases, the defendant acknowledged the basic facts underlying the alleged offense even as he or she denied the alleged manner or means of causing the alleged result. Each case contains a confession, in plain language, to the prohibited conduct such that the requisite mental state could at least be readily inferred.

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[89] *Kemph*, 12 S.W.3d at 532-33.

[90] *Hubbard*, 133 S.W.3d at 801-02.

This case is not one of "confession variance." The charging instrument alleged appellant struck Ebo in the face with his hand. The allegation was no mere placeholder; Ebo repeatedly said that is what he did. Appellant did not say he instead (justifiably) hit her with his elbow, or leg, or head; he said there was no fight and he did not admit to hurting her. Appellant cannot win even on his own terms.

Appellant cannot find refuge in a more exotic argument, either.

Had appellant plainly claimed that he recklessly caused Ebo's injury by hitting her with the door while trying to keep her out of his apartment, there might be an interesting question about whether that would be a confession to a different assault. In *Hernandez v. State*, this Court considered but did not resolve the issue of units of prosecution for assault.[91] Appellant's use of force on the door is arguably a separate event from the assault in his apartment—proved as pleaded—that he denied in full. As such, an election and limiting instruction for an extraneous bad act might have been warranted but not an instruction on self-defense.

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[91] *Hernandez v. State*, 556 S.W.3d 308 (Tex. Crim. App. 2017), reh'g granted (Mar. 21, 2018), adhered to on reh'g (Sept. 19, 2018). Hernandez argued that his conviction for aggravated assault using water as a deadly weapon should be reversed because the indictment alleged he struck the victim and there was no evidence he did so at the time he choked her and poured water down her throat. He claimed he hit her, left to get her a glass of water, and then committed a separate assault. This Court did not determine whether the incidents were separate assaults because the variance between the alleged and proved causes of injury when the water was used was immaterial.

As it stands, however, appellant cannot claim an admission to some possibly separate assault. Appellant did not admit to recklessly causing Ebo's injury with the door. Again, he did not admit to causing any injury; he implied she caused it herself. As for being reckless, appellant repeatedly claimed that he stopped resisting Ebo's entry because he did not want her to get hurt.[92] In other words, he was aware of the risk of injury and acted to avoid it. That is the opposite of recklessness.[93]

Let's be rational about this.

The only way for this Court to consider even a novel argument for entitlement is to pluck a confession to every element from his denial of all of them. In theory, a jury could, using its ability to believe all, some, or none of a witness's testimony,[94] find the following:

1. Ebo repeatedly lied when she said her injury was caused by appellant hitting her with his hand.

2. Ebo lied when she said appellant dragged her into his apartment before hitting her.

3. Appellant was being honest about his awareness of the risk of injury inherent in using force to keep Ebo out of his apartment.

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[92] 3 RR 229, 233, 257, 259, 261.

[93] "A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." TEX. PENAL CODE § 6.03(c).

[94] *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

4. Appellant either 1) lied when he denied any intent to hurt Ebo, or 2) lied when he said he stopped using force to avoid causing her injury.

5. Appellant lied when he disclaimed any responsibility for causing Ebo's injury.

A jury could make these findings, but it should not be permitted to because that would be irrational.

The general rule is that a defendant is entitled to a defensive instruction if it is supported by the evidence, even if that evidence is weak, contradicted, or impeached.[95] But this gives way to the larger concern that the system is damaged when juries are invited to return a verdict based on speculation rather than rational inference and determinations of credibility.[96] As this Court said in *Shaw*, it has been and still is the rule that courts are required to submit defensive instructions only when there is evidence "of sufficient cogence and substance to make it appear, at least with some degree of likelihood, that there could be a finding by the jury in response to such suggested issue."[97] This Court has arguably crossed this line when it comes to entitlement to lesser included offenses after denying the requisite intent.[98] It should

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[95] *Shaw*, 243 S.W.3d at 658.

[96] *Id*.

[97] *Id*. (quotations and citation omitted).

[98] *Bullock v. State*, 509 S.W.3d 921, 932-33 (Tex. Crim. App. 2016) (Newell, J., dissenting on (continued...)

draw the line at supplying the confession for a confession-and-avoidance defense when the defendant denies all the elements of the offense. No rational jury would go to such great lengths to fabricate a confession for someone who denied, in all ways possible, the commission of any offense.

IV. Conclusion

Although the court of appeals could have been more clear, its holding is correct: a defendant who comes nowhere close to admitting the offense alleged is not claiming self-defense. Appellant claimed he was scared but the victim's injuries were caused inadvertently, if at all. It is nothing more (and a little less) than the "accident" defense this Court said was not self-defense in *Nailor* fifteen years ago. Whatever the technical legal requirements of confession-and-avoidance, the factual requirements demand more than the blanket denial in this case. "[T]he lips are so tender" is not a justification defense.

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[98](...continued)
mot. for reh'g).

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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The undersigned hereby certifies that on this 17th day of June, 2019, a true and correct copy of the State's Brief on the Merits has been eFiled and electronically served on the following:

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